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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 979

11,000 ACRES OF LAND, MORE OF LESS, SITUATED IN SMITH COUNTY, TEXAS, GENERAL CRUDE OIL COMPANY, ET AL., OWNERS OF TRACT NO. E-419, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The district court did not write an opinion. The opinion of the circuit court of appeals (R. 134–139) and that of Judge Sibley, dissenting in part (R. 139–141), are reported in 152 F. 2d 566.

JURISDICTION

The judgment sought to be reviewed was entered on December 21, 1945 (R. 142). The petition for a writ of certiorari was filed on March

21, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether, when the United States takes possession of property and subsequently files a declaration of taking, the property is properly valued as of the date the United States took possession.

2. Whether fair annual rental of the surface of the land is a proper measure of compensation for the owner in fee of property taken by the United States for a term of years, extendable annually during the national emergency, when the owner had granted a ten-year oil and gas lease and is being paid "delay rentals" by the lessee.

3. A further question, presented by petitioners, but which we believe to be academic in this case, is whether compensation to lessees of an oil and gas lease should be determined annually or in one lump sum, when the interest taken by the United States is for a term of years, extendable annually during the national emergency.

STATUTES INVOLVED

Title II of the Second War Powers Act (Act of March 27, 1942, 56 Stat. 176, 177, c. 199, sec. 201, 50 U. S. C. (Supp. IV) 171a) and the Decla-

ration of Taking Act of February 26, 1931, 46 Stat. 1421–1422, c. 307, 40 U. S. C. 258a–258e are set out in Appendix A, *infra*, pp. 17–21.

STATEMENT

On March 26, 1943, the United States, at the request of the Secretary of War, instituted proceedings under Title II of the Second War Powers Act to condemn 11,000 acres of land in Smith County, Texas, for use in connection with the Tyler Air Force Replacement Training Center and for the expansion thereof (R. 1–17). The estate sought was a term for years ending June 30, 1943, together with the right to extend said term for additional yearly periods thereafter during the existing national emergency, at the election of the Secretary of War (R. 2–3, 12). On the same day as the proceedings were instituted, the trial court, as requested in the petition, entered an order granting immediate possession to the United States (R. 18–30, 12, 17). Possession was taken on April 1, 1943 (R. 125). The original term having been extended for another yearly period, an amended petition was filed on August 4, 1943, redescribing the lands included in the original petition and describing additional lands to be taken for a term of years ending June 30, 1944, with the right to extend for yearly periods for the duration of the emer-

gency, and describing certain other lands to be taken in fee (R. 31–46). On November 19, 1943, the United States filed a declaration of taking stating that it was taking an estate for years commencing April 1, 1943, and ending June 30, 1944, extendable for yearly periods during the national emergency. This declaration applied to several tracts, including the one involved in this proceeding, and $67.50 was deposited in court as estimated compensation for the term taken in the tract here involved (R. 57–60). The term having again been extended for another year, a supplemental declaration of taking was filed on September 5, 1944, for the purpose of depositing $54.00 estimated compensation for the period July 1, 1944, to June 30, 1945 (R. 65–66).

The tract here involved (Tr. No. E–419) consists of 91 acres owned in fee by Brady P. Gentry and Carl Shamburger, subject to an oil and gas lease owned by General Crude Oil Company (R. 70, 72, 75–76, 105–114).[1] Commissioners appointed to determine compensation for the property taken filed their report on February 6, 1945,

[1] The oil and gas lease which was obtained from a former owner covered 233.2 acres (R. 106). Tract E–419 contains only 91 of the acres (R. 89–90). Under the oil and gas lease, the lessors reserved rights to one-eighth of oil produced and saved, one-eighth of the net proceeds derived from the sale of gas and gasoline or other products manufactured from the gas and sold by the lessee, and one-eighth of the market value in the field of gas sold by the lessee (R. 107–108).

awarding "damages to said tract of land and the just compensation for the taking therefor, in the sum of $20,475.00" (R. 67–68). Of this sum $11,375.00 was "for damages to the oil and gas mining leasehold estate" and the remaining $9,100 was for "all other damages by reason of such taking" (R. 67). The United States filed objections to the commissioners' award and requested a jury trial (R. 68–69). General Crude Oil Company thereupon filed an answer alleging that it was the owner of mineral leases "at the time the title to said premises and the oil, gas and mineral rights and interests therein, were condemned and acquired by the United States" and claiming that as a result of the taking the fair cash market value of its oil and gas lease had been diminished, depreciated, and damaged in the amount of $25,000 (R. 70–71). The fee owners answered, claiming that they had sustained damages in the sum of $15,000 (R. 72).

At a trial before a jury, it was contended that the oil and gas had been taken or its value destroyed, and the owners and the lessee offered to prove the fair cash market value of the oil and gas leasehold interest as of March 26, April 1, and November 19, 1943 (R. 76–77, 82–83, 99),[2] the diminution in the fair cash market value of the oil

[2] These dates represent the date of the order of possession (March 26), the date possession was actually taken (April 1) and the date of filing the first declaration of taking (November 19).

and gas leasehold interest as of March 26 and November 19, 1943, resulting from the condemnation (R. 83, 99); the fair cash market value of the full fee simple title of the land (R. 96–97); the market value of the mineral rights subject to the oil and gas lease (R. 99–100) and the diminution or depreciation in the fair cash market value of the fee including minerals (R. 97–98). The trial court excluded this evidence (R. 82–83, 96–98, 99) but admitted the annual fair cash rental value on an indeterminate lease of the lessee's rights under its oil and gas lease (R. 75, 85–90) and the fair cash rental value of the surface of the land (R. 95). The trial court ruled that the lessee could show the annual fair cash rental value of the land for all purposes—oil, mineral and surface purposes—including the right to occupy, operate, and explore for oil and gas (R. 86–90).

Petitioners' witness estimated such annual rental value at $1.50 per acre per year (R. 90). The same witness testified that the fair, cash rental value of the surface exclusive of the leasehold was $1.50 per acre per year (R. 95). Other witnesses testified, over the Government's objections (R. 100, 101), that General Crude Oil Company had applied to the Railroad Commission of Texas for a permit to drill, on April 13, 1943, subsequent to the taking by the United States (R. 101, 116–118), that the permit was granted (R. 103, 119–120), but that the Office of

the Division Engineer of the War Department had advised them that the right of ingress and egress for the exploration of oil on land leased by the Government could not be granted (R. 100, 114–115). The United States introduced no evidence of the value of Tract E–419.

On April 18, 1945, the jury returned its verdict awarding as annual rental or use for Tract E–419, $136.50 ($1.50 per acre) to the owners and the same sum to General Crude Oil (R. 123). Judgment was entered on May 11, 1945, fixing the annual rental in the amounts awarded by the jury and ordering the total sum then due the owners and lessee from April 1, 1943 (the date possession was taken), to June 30, 1945 (the date to which the interest taken had been extended), to be paid, together with interest at 6% on the difference between the deposits and the judgment from April 1, 1943, until the date of payment (R. 123–127). The judgment provided for payment at the same annual rate for future extensions and retained jurisdiction of the cause for such further orders as might be necessary (R. 127). The owners and the lessee appealed to the court below (R. 128).

The circuit court of appeals sustained the holding of the trial court that the estate taken should be valued as of April 1, 1943 when the Government took possession (R. 139). It affirmed the judgment awarding to the owners of the prop-

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erty an annual rental value of $1.50 per acre per annum (R. 139). However, it held that the award to the owner of the mineral lease was erroneous. The court reasoned that the leasehold owner had the absolute right to explore for and exploit the oil and gas, that the Government's successive annual extensions had deprived the lessee of such rights to the extent of each year taken and "one more extension will result in total destruction of the leasehold estate" (R. 137). The majority of the court concluded that compensation should be determined for each year by measuring the market value before and after the taking (R. 137–139). The court held, however, that in view of the fact that three years had elapsed, the procedure could be simplified upon a new trial by treating the three one-year takings as a single taking (R. 138). While agreeing with the other conclusions of the majority opinion, Judge Sibley took the view that the determination of compensation should be postponed until the year by year taking ceases or the mineral lease terminates (R. 141).

The war ended during the pendency of the appeal. The Army has ceased its activities at this camp and some of the land, which had been acquired in fee simple, has been declared to be surplus property. The temporary occupancy of the parcel here involved will not be extended beyond June 30, 1946, and, hence, the Government will have given up possession when the new trial

is had. These facts appear in the letter attached hereto as Appendix B, *infra*, p. 22.

ARGUMENT

1. In holding that the date of taking for purposes of valuation was April 1, 1943, the court below stated (R. 139) "We regard it as well settled that, either where no declaration of taking is filed, or where, as here, the declaration of taking is filed on a date subsequent to the actual passing of possession, the market value of the property taken should be determined as of the date possession was acquired." Petitioners do not, and cannot, deny that when no declaration of taking is used, the date of possession is the date of taking for valuation purposes. *United States* v. *Rogers*, 255 U. S. 163, 169; *Seaboard Air Line Ry. Co.* v. *United States*, 261 U. S. 299; *Jacobs* v. *United States*, 290 U. S. 13.

Plainly, the later filing of a declaration of taking does not change this result. *Bank of Edenton* v. *United States*, 152 F. 2d 251 (C. C. A. 4). It has been the practice, when possession is taken in advance of filing the declaration of taking, to determine value at the date of possession and to compute interest from that time.[3] Of course, when

[3] *United States* v. *6.87 Acres of Land, Etc.*, 147 F. 2d 351, 352 (C. C. A. 2); *United States* v. *412.715 Acres of Land, Etc.*, 60 F. Supp. 576, 577 (N. D. Cal.); *United States* v. *12,918.28 Acres of Land, Etc.*, 57 F. Supp. 893, 895 (W. D. La.); *United States* v. *17,280 Acres of Land, Etc.*, 57 F. Supp. 745 (D. Neb.); *United States* v. *Entire Fifth Floor in Butterick Bldg.*, 54 F. Supp. 258, 259, 260 (S. D. N. Y.).

possession has not previously been taken, value is determined at the date of filing the declaration of taking, as provided in the Declaration of Taking Act. *United States* v. *576.734 Acres of Land in Montgomery County, Pa.*, 143 F. 2d 408 (C. C. A. 3), and *United States* v. *Bennett*, 57 F. Supp. 670 (E. D. Wash.) relied upon by petitioners (Br. 10–11) were cases of that type. The Declaration of Taking Act, which provided a procedure by which the Government could secure possession and title, did not contemplate that the Government would have previously obtained possession. Hence, its provision as to date of taking cannot, as petitioners argue (Br. 5, 7, 8), be construed to govern cases where the Government secures possession, prior to the filing of a declaration of taking, by some other procedure, such as the Second War Powers Act. The latter Act permits the making of improvements prior to approval of title; hence the only reason for filing a declaration of taking in the instant case was to reduce interest liability and to make some funds available to the condemnees. Cf. *United States* v. *Miller*, 317 U. S. 369, 381.[4] Petitioners' contention (Br. 12–13) that the result of the decision

[4] The practice, here used, of obtaining possession under the Second War Powers Act, usually under a petition containing a perimeter description of a large area (R. 3–12), and subsequently filing a series of declarations of taking covering various tracts (R. 57–60), was frequently followed during the war when immediate action was necessary. Cf. *Catlin* v. *United States*, 324 U. S. 229.

below is unfair lacks merit because, if the contrary view were taken, the Government could deprive the owner of all use of his property for an indefinite period and yet choose the date of taking most unfavorable to him by filing the declaration of taking at a time when the market is lowest, or, if market prices have increased, not file a declaration of taking at all. It is much fairer to fix the date of valuation by the date of possession so that neither the Government nor the owner will suffer advantage or disadvantage from subsequent variations in the market.

United States v. *150.29 Acres of Land, Etc., in Milwaukee County,* 135 F. 2d 878 (C. C. A. 7) does not support a contrary conclusion (Cf. Br. 9–10). No question of date of taking for purposes of determining either value or liability of the United States for delay in payment was involved. The issue related to the right of the taxing authorities to share in the distribution of the total award.[5] The owners contended that the United States had "taken" the property when it took possession and, therefore, that taxes could not thereafter become a lien to be paid out of the award. Since the taxability of the property depended upon the date legal title passed to the United States, the court quite correctly held that

[5] For this reason, the Government had no interest in the outcome of the case and although it appeared, it took no position on the merits, and simply urged that if the taxes were a lien they should be paid out of the total award.

title did not pass until the filing of the declaration of taking. Cf. *United States* v. *412.715 Acres of Land, Etc.*, 60 F. Supp. 576, 577 (N. D. Cal.). Thus, in the *Milwaukee County* decision, the expression "date of taking" was used in the sense of date of taking title for the purpose of determining whether the property was constitutionally exempt from taxation and its use does not indicate disagreement with the court below.

2. Petitioners do not challenge the holding of the court below that the annual rental value awarded by the trial court to the owners represented adequate compensation for the temporary use of the land, aside from the alleged mineral value (R. 139). They do urge that the owners, like the lessee, "suffered a tangible loss in the value of their mineral estate" (Br. 19) and have an equal right to compensation therefor. In so doing, however, petitioners completely ignore the fact, relied upon by the court below, that, in the case of the lessee, as contrasted with that of the owners, the Government might retain possession beyond the term of the mineral lease and thus prevent the lessee from exercising any of its rights with respect to the minerals.

The judgment of the district court (R. 123–127) granted to the Government only an estate for years in the tract involved, and it is clear that such an estate carries with it no right to the underlying minerals. See 1 Summers, *Oil & Gas* (Perm. ed.) Sec. 32; 2 *id.* at Sec. 223. Since the

Government planned no extraction of minerals and, indeed, the judgment permitted none, the owners will, of course, have the same right in the minerals after the Government's occupancy ends as they did prior to the taking. As Judge Sibley stated (R. 141): "I do not think these fee owners show that anything has been taken from them but the surface use of their lands which they themselves testified was worth what was awarded them. Their minerals remain uninjured in the earth."

Since it was the lessees and not the owners who were deprived of the right to exploit the oil during the period of the Government's occupancy,* the only possible damage to the owners might be the loss of an opportunity to make a profitable sale of the land and underlying minerals, subject to the lease. Such damage, we submit, arising only from a loss of an opportunity to make business profits, is not compensable. *Omnia Co.* v. *United States,* 261 U. S. 502, 510, 513; *United States ex rel. T. V. A.* v. *Powelson,* 319 U. S. 266, 281–282; cf. *Mitchell* v. *United States,* 267 U. S. 341; *Bothwell* v. *United*

* Whether and to what extent the lessee has a compensable interest because of the possibility that his lease may not survive the period of Government occupancy is a question the decision of which is no longer necessary in this case since the Government's occupancy will, in fact, end before the expiration of the ten-year lease. See *supra*, pp. 8–9. Upon a new trial it will appear whether there has been, in fact, a loss of value and, if so, what was the cause thereof. This consideration was itself sufficient to convince the Government that a cross-petition for a writ of certiorari in this case would not be appropriate.

States, 254 U. S. 231; see also *United States* v. *Petty Motor Company, et al.,* Nos. 77–83, this Term, slip opinion p. 5. This Court's decision in *United States* v. *General Motors Corporation,* 323 U. S. 373, 383, recognizes this rule, and is, therefore, not inconsistent with the decision below (cf. Pet. 10). The claim of petitioners is no different from that of any other land owner that, while the Government was in temporary occupancy, he lost a chance to sell the property at an enhanced price. The Fifth Amendment does not require the payment of damages for such lost opportunities.

Petitioners refer (Br. 16) to *Eagle Lake Improvement Co.* v. *United States,* 141 F. 2d 562 (C. C. A. 5), which held that when the United States condemned a fee simple title the value of the mineral interest might be considered. But in that case, since the Government had taken fee title, the owners were deprived of whatever mineral value the land might have. Here the owners have not been deprived of their rights in whatever minerals may exist; all that happened was that the enjoyment of those rights was postponed. Since the delay rentals compensate the owners for such postponement,[7] the denial

[7] Petitioners define the delay rentals as "the consideration * * * for the privilege of deferring lessee's development undertakings in the lease" (Br. 17). In the absence of any other evidence of value, therefore, such delay rentals were the proper measure of compensation for the postponement of the right to explore and produce oil.

of their claim was, we submit clearly correct, and the ruling on this issue does not create a conflict of decisions.

3. The majority of the court below held that compensation to the lessee should be determined annually. Judge Sibley took the position that the lessee's damages should be assessed in a single award made when the year-to-year taking ceases or the lease ends (R. 141). Petitioners take the view that compensation should be awarded in one lump sum at the time of taking (Br. 25–30). Before a new trial may be had, however, this difference in view as to the proper method of determining compensation will become a moot question, for the Government's occupancy will end at the latest on June 30, 1946. See *supra,* pp. 8–9. The majority opinion below recognized that the years already elapsed should be treated as a unit (R. 138). Thus, upon a new trial, compensation will be determined, as petitioners ask, in one proceeding and judgment (Br. 25). There is no reason, therefore, for further review of this issue in this case.

Moreover, the decision of the court below that, in the case of temporary takings like that here involved, compensation should be measured annually is, we submit, clearly correct. To adopt petitioners' suggestion would be to permit a trial court or a jury to speculate as to the duration of the Government's occupancy and to award a lump sum based on such speculation. Compensation should not be so computed. *United*

States v. *Certain Parcels of Land, etc.*, 55 F. Supp. 257, 264 (D. Md.); *United States* v. *16.747 Acres of Land*, 50 F. Supp. 389, 391 (D. Del.); cf. *United States* v. *5.741 Acres of Land in Flushing and Arde Bulova*, 51 F. Supp. 147, 148 (E. D. N. Y.); *United States* v. *Entire Fifth Floor in Butterick Building*, 54 F. Supp. 258, 261 (S. D. N. Y.); *Johnson* v. *United States*, 2 C. Cls. 391, 415–416, 419; *Johnson* v. *United States*, 4 C. Cls. 248, 251; *Pope* v. *United States*, 26 C. Cls. 11, 13. But cf. *United States* v. *9.94 Acres of Land in City of Charleston*, 51 F. Supp. 478 (E. D. S. C.); *United States* v. *60,000 Square Feet of Land known as Oakland Hotel*, 53 F. Supp. 767 (N. D. Cal.); *United States* v. *Bauman*, 56 F. Supp. 109 (D. Oregon).

CONCLUSION

The decision below is correct as to the questions urged by petitioners and there is no conflict. Moreover, one of the questions presented by petitioners will shortly become moot. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted.

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APRIL 1946.